DATE: April 21, 1994
CASE NO. 88-ERA-31

IN THE MATTER OF

JOHN R. BRYANT,

COMPLAINANT,

v.

EBASCO SERVICES, INC.,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Before me for review is the Recommended Decision and Order on Remand (R.D. and O.) of the Administrative Law Judge (ALJ) in this case arising under the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). This case was remanded to the ALJ on July 9, 1990, for further consideration of Complainant's allegations: (1) that Respondent violated the terms of a Settlement Agreement by refusing to rehire him to a comparable position, and (2) that Respondent blacklisted him. After considering the effect of the alleged reemployment terms of the settlement, the ALJ concluded that Complainant failed to establish blacklisting or retaliatory refusal to rehire. The ALJ recommends dismissal of the complaint.

BACKGROUND

Complainant was terminated from his position as a quality control inspector at the South Texas nuclear plant on January 9, 1987, as part of a reduction in force. He filed a complaint

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alleging discriminatory discharge on January 20, 1987. On April 10, 1987, the parties agreed to settle the matter and signed a "Release." This had the effect of terminating the first complaint. Complainant filed a second complaint on January 11, 1988, alleging discriminatory refusal to rehire in violation of a reemployment term of the April 1987 settlement agreement, and

further alleging blacklisting in retaliation for filing the prior complaint.

By Order of Dismissal issued on March 15, 1989, the ALJ recommended granting Respondent's motion for summary judgment and dismissing the complaint. On review, the Secretary issued a Decision and Order of Remand, dated July 9, 1990, granting dismissal in part and remanding in part for further consideration of Complainant's allegations of blacklisting and refusal to rehire to a comparable position. [1] The ALJ was instructed to consider the effect, if any, of the alleged reemployment term of the prior settlement agreement.

A hearing was held on remand, and the ALJ's R.D. and O. was issued on February 27, 1992. Both parties responded to an Order Establishing Briefing Schedule issued on March 11, 1992. [2]

For the reasons discussed herein, I accept the ALJ's recommendation to dismiss the complaint. The record fully supports a finding that Respondent Ebasco Services, Inc. (ESI) proffered legitimate, non-discriminatory reasons for refusing to rehire Complainant, which were not shown to be pretextual, and further, that Complainant failed to establish blacklisting by Respondent. The following discussion clarifies the analysis on the merits of each allegation raised by Complainant.

DISCUSSION

Under the burdens of proof and production in "whistleblower" proceedings, a complainant first must make a prima facie showing that protected activity motivated the respondent's decision to take adverse employment action. Respondent may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. Complainant then bears the ultimate burden of persuading that the legitimate reason proffered by the respondent is a pretext and that the true reason for the adverse action is discriminatory. *St. Mary's Honor Center v. Hicks*, No. 92-602, 1993 U.S. LEXIS 4401, at 15-16 (U.S. June 25, 1993); *Dartey v. Zack Company of Chicago*, Case No. 80-ERA-2, Sec. Dec., Apr. 25, 1983, slip op. at 5-9, citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Finally, when a complainant carries his burden of proving by a preponderance of the evidence that retaliation was a motivating factor in the adverse action, *i.e.* that respondent's adverse action was motivated by both legitimate and prohibited reasons,

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the dual motive doctrine applies. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163-64 (9th Cir. 1984); *Dartey*, slip op. at 8-9. In order to avoid liability in such a case, respondent has the burden of proving by a preponderance of the evidence that it would have taken that same action even if complainant had not engaged in any protected activity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989); *see Mackowiak*, 735 F.2d at 1163; *Dartey* at 9.

In order to establish a prima facie case, Complainant must show that he engaged in protected activity, that he was subject to adverse action, and that Respondent was aware of the protected activity when it took the adverse action. Additionally,

Complainant must present evidence sufficient to raise the inference that the protected activity was the likely motive for the adverse action. *Dartey* at 5-9.

A. *Reinstatement to a comparable position*

Complainant made a prima facie showing of discriminatory refusal to rehire him to a comparable position. It is undisputed that Complainant engaged in protected activity by refusing to approve an improper weld, by reporting to the Nuclear Regulatory Commission (NRC), and by filing his ERA complaint with the Department of Labor, and that Respondent was aware of this activity. Complainant presented evidence that as a term of settlement, Respondent orally agreed to reinstate him to a position comparable to his former employment, that he has sought reemployment with Respondent in any position available, and that he has not been rehired. He also presented sufficient evidence to raise an inference that his protected activity is the likely motive for the failure to rehire. The "temporal proximity" between Complainant's protected activity and the alleged adverse action is sufficient to raise the inference of causation. *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Thompson v. Tennessee Valley Authority*, Case No. 89-ERA-14, Sec. Final Dec. and Order, July 19, 1993, slip op. at 5.

With respect to the allegation of discriminatory refusal to rehire, Respondent asserted that there was no oral agreement to reinstate Complainant, and further, that Respondent is not qualified for any comparable position available with ESI, because a high school diploma is required at that level. Moreover, Respondent asserts that it does not have authority to hire for other potential positions which do not require a high school diploma.

The ALJ correctly concluded that Respondent proffered legitimate, nondiscriminatory reasons for the failure to rehire Complainant. [3] It is undisputed that Complainant was hired by Respondent based on a falsified resume, application form and diploma indicating that he was a high school graduate. The

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application form which was signed by Complainant contained language that "misrepresentation or omission of facts requested herein may be cause for dismissal." Ex. P-1. Respondent was not certain of this falsified resume information until Complainant's interrogatory answer of September 2, 1988, and his later admission at the first ALJ hearing on January 24, 1989, Tr. at 13, both following the negotiation of the settlement agreement and Complainant's filing of his second ERA complaint.

Respondent presented uncontroverted testimony that in accordance with customary practice, it sought employment for Complainant before his January 1987 layoff, after his layoff, and before and after he signed the April 1987 Release, by submitting his name for work on potential future contracts. ALJ at 6; Ex. R-10, 16. Further, Respondent proffered evidence that upon learning of the fraudulent high school diploma, all of Complainant's work was reinspected at a cost of $50,000, and that during that period he was not considered for rehire.

The record evidence establishes that a high school diploma is required for any comparable position with Respondent, a subcontractor for quality assurance inspection. Moreover,

Respondent explained its hiring practices and showed that the clients decide which of the offered candidates are hired. With respect to craftworker (non-quality) positions, Respondent demonstrated that hiring occurred through Ebasco Constructors, Inc. (ECI), under a collective bargaining agreement which required all craftworkers to be union members and hired through a local union hall. [4]

Complainant has failed to show that Respondent's proffered reasons for not rehiring him are a pretext for retaliation. Complainant has provided no evidence to refute Respondent's hiring practices and has not shown that Respondent hired any other employee without a high school diploma. Complainant admits that he is not qualified for positions in a nuclear power facility.

Complainant essentially is relying on the alleged oral settlement term of reemployment, and arguing that Respondent would rehire him despite his lying about a high school diploma, except that he filed a complaint against them. [5] Even assuming that Complainant established that his protected activity played a part in the failure to rehire, I find that under the "dual motive" analysis articulated in *Price Waterhouse v. Hopkins*, 490 U.S. at 242, Respondent has sufficiently demonstrated that even absent Complainant's protected activity, Respondent would not have rehired Complainant to a comparable position under these circumstances. *See Atchison v. Brown & Root*, Case No. 82-ERA-9, Sec. Dec. and Final Ord., June 10, 1983, slip op. at 25-26. [6]

B. *Blacklisting*

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Generally, blacklisting based on a complainant's protected activity has been recognized as a violation of the ERA. *See Cowan v. Bechtel Construction, Inc.*, Case No. 87-ERA-29, Sec. Dec. and Ord. of Remand, Aug. 9, 1989, slip op. at 3-4; *Egenrieder v. Metropolitan Edison Company*, Case No. 85-ERA-23, Sec. Ord. of Remand, April 20, 1987, slip op. at 6. Here, Complainant made a prima facie case of blacklisting. As discussed above, he established protected activity of which Respondent was aware. He also presented evidence of "bad paper" rumors circulated by Respondent's personnel, and indicated that throughout 1987 and 1988, he was rejected for positions solicited with other nuclear employers and that his solicitations through job shoppers were not fruitful either.

I conclude, however, that Complainant has presented insufficient evidence to carry his ultimate burden of showing that Respondent has blacklisted him in violation of the ERA. Respondent has presented credible testimony that the evidence supporting "bad paper" rumors is subsequent to discovery of Complainant's misrepresentations and that any references to bad paper by coworkers refer to Complainant's misrepresentations on his resume, his lack of qualifications, and the resulting reinspection of all of his work. Respondent convincingly denies any blacklisting prior to its knowledge of Complainant's misrepresentations. Respondent further indicates that on one occasion it provided information about Complainant to a potential

employer, but it was an honest response to a request for a reference and concerned the reinspection of Complainant's work and his lack of qualifications, and was not a retaliatory blacklisting. Complainant has presented no evidence to establish that Respondent's rebuttal is a pretext. [7]

Accordingly, this complaint is dismissed.
SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The decision concluded that Complainant was not qualified for reinstatement to his former quality control position.

[2] Respondent filed a letter referring me to its Post-Hearing Brief of January 24, 1992.

[3] Respondent disputes that the reinstatement of Complainant to a comparable position was a term of the settlement in April 1987. Based on the evidence, including his credibility determinations, the ALJ concluded that this was part of an oral agreement between the parties.

[4] The ALJ's factual finding that ECI was established as an independently operated company from ESI is based on unrefuted evidence in the record. Although Complainant challenges this finding, he presented no evidence in controversion. Respondent correctly points out that ECI was not a party to the settlement between ESI and Complainant.

[5] On the particular facts of this case, I find that a determination that Complainant's reinstatement was a term of the prior settlement agreement between the parties, does not affect the outcome of Complainant's allegation that Respondent has discriminatorily refused to rehire him. Respondent has presented sufficient evidence of its legitimate reasons for not rehiring Complainant so as to rule out any discriminatory motive. Without a showing of retaliatory motive, Complainant cannot prevail under the ERA. The authenticity of the "Release" or the calculation of back pay and monetary payment are in dispute. However, alleged oral terms of settlement are contested. I make no further findings as to this purported settlement agreement.

[6] In further support of this conclusion, I note that in the factual situation presented in this employment discrimination case involving resume fraud which was discovered post-discharge, the after-acquired evidence doctrine has been applied by the courts to bar recovery by complainants. *See McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539 (6th Circuit 1993); *Summers v. State Farm Mut. Auto Ins. Co.*, 864 F.2d 700 (10th Cir. 1988); *Puhy v. Delta Air Lines, Inc.*, 833 F. Supp. 1577 (U.S. Dist. Ct. for N. D. GA 1993).

[7] By letter of February 14, 1994, Complainant's counsel urged that consideration of the Supreme Court's decision in *ABF Freight System, Inc. v. NLRB*, No. 92-1550, 1994 U.S. LEXIS 1142 (January 24, 1994), would warrant a finding for Complainant in this case. I disagree. In that case, the employer was found to have unlawfully discharged the employee for union activities and to have then used the "lying" excuse as a pretext for the illegal discharge. In the instant case, I find that Respondent proferred legitimate reasons for refusing to rehire Complainant, and that Complainant failed to carry his ultimate burden of showing that the adverse action was motivated by protected activity. The decision in *ABF Freight* does not alter the outcome or the analysis applied in this case.